IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, and SIERRA CLUB, Plaintiff-Intervenor v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

UNITED STATES' UNOPPOSED MOTION
FOR ENTRY OF JUDGMENT PURSUANT TO RULE 54(b)

The United States seeks partial final judgment pursuant to Fed. R. Civ. P. 54(b) so that it may pursue an appeal of the Court's March 3, 2014 summary judgment decision. Doc. # 196 ("2014 SJ Decision"). We believe that this will provide the most efficient way to resolve the claims and disputed legal issues before the Court. The undersigned counsel has conferred with counsel for Defendants and the Plaintiff-Intervenor, and neither opposes this motion.

Respectfully Submitted,

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Dated: June 30, 2014

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UNITED STATES' MEMORANDUM OF LAW
IN SUPPORT OF ITS UNOPPOSED MOTION
FOR ENTRY OF JUDGMENT PURSUANT TO RULE 54(b)

ISSUED PRESENTED

Should the Court certify its March 3, 2014 decision as a partial final judgment, allowing an appeal of the Court's order?

Answer: Yes.

LEADING AUTHORITY FOR THE RELIEF SOUGHT

Fed. R. Civ. P. 54(b)

GenCorp, Inc. v. Olin Corp., 390 F.3d 433, 442 (6th Cir. 2004)

Gen. Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022 (6th Cir. 1994)

INTRODUCTION

The United States seeks partial final judgment pursuant to Fed. R. Civ. P. 54(b) so that it may pursue an appeal of the Court's March 3, 2014 summary judgment decision. Doc. # 196 ("2014 SJ Decision"). We believe that there is no just cause for delay and this will provide the most efficient way to resolve the claims and disputed legal issues before the Court. The undersigned counsel has conferred with counsel for Defendants and the Plaintiff-Intervenor, and neither opposes this motion. As discussed in the May 2014 status conference, Defendants plan to move to stay proceedings in this Court pending any appeal.

BACKGROUND

The United States first filed suit in August 2010, alleging New Source Review ("NSR") violations at the Monroe Unit 2 power plant based on a construction project performed from March through June of 2010. In August 2011, the Court granted summary judgment to Defendants and dismissed the United States' claims. In March 2013, the Sixth Circuit reversed and remanded the case back to this Court. Shortly thereafter, Defendants moved again for summary judgment, while the United States and Plaintiff-Intervenor Sierra Club moved to amend their complaints. The Court granted each of those motions, resolving the original claims concerning the Monroe 2 2010 construction work, while allowing the parties to add claims addressing different construction projects.

On April 2, 2014, Sierra Club filed a motion seeking a partial final judgment under Rule 54(b) to appeal the 2014 SJ decision. Doc. # 201. Defendants subsequently filed a response stating they did not oppose the motion. Doc. # 204. Meanwhile, the Court allowed the United States leave to file any Rule 54(b) motion by June 30, 2014. Doc. # 213. The United States has completed its decision process and now moves for entry of a Rule 54(b) judgment with respect to the NSR claims concerning the Monroe 2 2010 construction project that were alleged in the original complaint and that the Court resolved in its 2014 SJ Decision.

STANDARD OF REVIEW

Rule 54(b) allows a district court to direct entry of a final judgment for certain claims in a case to allow "immediate appellate review of a district court's judgment even though the lawsuit contains unresolved claims." *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 442 (6th Cir. 2004).

In certifying a judgment for appeal, the district court must (1) "expressly direct the entry of final judgment as to one or more but fewer than all the claims or parties" in a case, and (2) "expressly determine that there is no just reason to delay" an appeal. *Gen. Acquisition v. GenCorp, Inc.*, 23 F.3d 1022, 1026-27 (6th Cir. 1994). In making the second determination, a court considers the following factors laid out by the Sixth Circuit (and may consider other factors):

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.

Corrosioneering, Inc. v. Thyssen Envtl. Sys., Inc., 807 F.2d 1279, 1283 (6th Cir. 1986).

The court's decision to issue a partial final judgment is reviewed by an appellate court under a dual standard. In granting a Rule 54(b) judgment, the court must articulate its reasoning for granting certification. *EJS Properties, LLC. v. Toledo*, 689 F.3d 535, 537 (6th Cir. 2012).

ARGUMENT

As all the Parties agree, a Rule 54(b) entry of partial final judgment is the appropriate next step for this case. Doc. ## 201 (Sierra Club), 204 (Defendants). The Court's 2014 SJ Decision resolves the United States' claims with respect to the 2010 construction project at Monroe Unit 2. Those claims are factually distinct from the new claims in the amended complaints. Moreover, allowing appeal now will serve to most efficiently resolve the entire dispute between the Parties by providing legal guidance for the new claims.

I. The 2014 SJ Decision Resolves Certain Claims In This Case

The first question for the Court is simply whether the 2014 SJ Decision resolves some but not all of the claims in the case. Fed. R. Civ. P. 54(b); *Gen. Acquisition, Inc*, 23 F.3d at 1026-27. It does, as Defendants and Sierra Club have already stated to the Court. Doc. ## 201 at 8-11 (Sierra Club), 204 at 1-2 (Defendants).

The 2014 SJ decision resolved the United States' and Sierra Club's claims with respect to Defendants' 2010 construction project at Monroe Unit 2. The remaining claims in the case – as set forth in the amended complaints allowed by this Court in March 2014 – all relate to *other* construction projects performed by Defendants. All but one of those projects are at different coal-fired generating units. In determining whether a complaint contains multiple claims, the Sixth Circuit has stated that, "the concept of a claim under Rule 54(b) denotes the aggregate of operative facts which give rise to a right enforceable in the courts." *Gen Acquisition, Inc.*, 23 F.3d at 1028; *GenCorp*, 390 F.3d at 442 (internal quotes omitted). In other words, a court will find that multiple claims are present as long as each claim arises from a logically independent and distinct set of facts that could support an independent claim.

Here each construction project presents a distinct set of operative facts. Each project was performed at a different time with distinct replacements and

upgrades. Therefore the Court can find that the 2014 SJ Decision resolves the Parties claims with respect to the 2010 project at Monroe Unit 2 without resolving the remaining claims. This satisfies the first requirement for a partial final judgment under Rule 54(b).

II. There Is No Just Reason To Delay An Appeal

The Court can also find that there is no just reason to delay appellate review. In fact, allowing for appellate review at this stage will streamline further proceedings and minimize the burden on the Court and the Parties. Again, Defendants and Sierra Club agree that there is no just reason to delay an appeal. Doc. ## 201 at 11-17 (Sierra Club), 204 at 1-2 (Defendants).

Turning to the five factors outlined by the Sixth Circuit, each either favors immediate appeal or is neutral. *See In re: Seizure of $143,265.78*, 616 F. Supp. 2d 708, 709 (E.D. Mich. 2009) (granting 54(b) certification where the factors are either neutral or favor partial final judgment).

First, as explained above, the adjudicated claims (those concerning Monroe Unit 2) are separate and distinct from those of the unadjudicated claims. *See, e.g., Lowery v. Fed. Exp. Corp.*, 426 F.3d 817, 822 (6th Cir. 2005) (noting the importance of the separability of adjudicated and unadjudicated claims); *Gen-Pa Bigli Islem Limited Liability Co. v. Virtual Technology, Inc.*, 169 F.R.D. 84, 87 (E.D. Mich. 1996) (finding Rule 54(b)

certification proper when the adjudicated and unadjudicated claims are distinct and independent).

Second, further developments in this Court will not eliminate the need for appeal. The Court's decision on the new claims will not affect the legal rulings in the 2014 SJ Decision, which the United States and Sierra Club have decided to appeal. *See, e.g. Planned Parenthood v. DeWine*, 696 F.3d 490, 503 (6th Cir. 2012) (upholding Rule 54(b) certification based on, *inter alia*, "the unlikelihood that the need for appellate review would be mooted by future developments").

Third, the Rule 54(b) judgment would not require the Sixth Circuit to consider the same issue a second time. A decision by the Sixth Circuit would provide clarity for the Parties and the Court in addressing the new claims and minimize the potential for appeal after the resolution of those claims. *See, e.g.*, *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013) (upholding Rule 54(b) certification based on, *inter alia*, the finding that it was "unlikely that the appellate court would be required to consider the same issue twice.").

Fourth, there is no claim or counterclaim that could result in a set-off against the judgment.

Finally, factors of "delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like," *Gen.*

Acquisition, 23 F.3d at 1030, favor immediate appeal. Granting the present motion will promote judicial economy and lead to efficient litigation. Allowing immediate appellate review of the legal issues in dispute will provide clarity to the application of the relevant NSR rules, and allow the parties to more efficiently litigate the remaining claims. *See, e.g.*, *Liberte Capital Group v. Capwill*, 148 Fed. Appx. 426, 432, (6th Cir. 2005) (affirming Rule 54(b) certification where the district court found that resolving an important legal issue "would expedite the entire litigation, and allow all the litigants to benefit by a swifter resolution of all claims"). Additionally, because the Court of Appeals will narrow the legal and factual issues in dispute, Rule 54(b) certification could shorten the length of trial and minimizes expenses for the Court and parties. *See Planned Parenthood*, 696 F.3d at 503 (Rule 54(b) certification proper because of "the possibility that immediate appeal would shorten the time and expense of trial"). Notably, as explained further in Sierra Club's brief, two other district courts have granted Rule 54(b) judgments in NSR cases in similar circumstances. *See* Doc. # 201 at 16.

CONCLUSION

For the foregoing reasons, this Court should enter final judgment of the Court's decision resolving the Monroe Unit 2 claims under Fed. R. Civ. P. 54(b).

Respectfully Submitted,

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Dated: June 30, 2014

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion and brief were served via ECF on counsel of record.

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